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IN THE

Supreme Court of the United States

OCTOBER TERM — 1964

NO. 474

PAN-AMERICAN WORLD AIRWAYS, INCORPORATED, AND THE TRAVELERS INSURANCE COMPANY,
Petitioners

versus

STEPHEN O'HEARNE, Deputy Commissioner, Fifth Compensation District, U. S. Department of Labor, Bureau of Employees' Compensation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN W. WINSTON,

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versus

STEPHEN O'HEARNE, Deputy Commissioner, Fifth Compensation District, U. S. Department of Labor, Bureau of Employees' Compensation,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pan-American World Airways, Incorporated, and The Travelers Insurance Company petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case on July 13, 1964.

OPINIONS BELOW

The various compensation orders and lower court opinions are to be found in the Record printed as part of the Appendix therein beginning at Page 1 of that Record. The compensation orders and award of Deputy Commissioner O'Hearne are printed in such Appendix at pages 14-a through 22-a thereof. The memorandum opinion of the District Court directing that these compensation orders and award be set aside appears in such Appendix at pages 2-a through 13-a thereof. (The Final Order of the District Court is at pages 1-a and 2-a of the Appendix.) The opinion of the Fourth Circuit Court of Appeals reinstating the award appears in the Record at page 14.

JURISDICTION

The judgment of the Court of Appeals (Record page 14) was entered on July 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Deputy Commissioner found that the accidental death of a defense base employee in a motor vehicle accident on San Salvador Island while the employee was off duty, away from his place of employment and from his abode, and while engaged in recreation other than that sponsored and furnished by his employer, arose out of and in the course of his employment. Based upon this conclusion, the Deputy Commissioner awarded death benefits under the Longshoremen's and Harbor Workers' Act, as extended by the Defense Bases Act. The District Court set aside this award, and the Circuit Court of Appeals reinstated it.

The questions presented are:

(1) Whether the Deputy Commissioner and the Court of Appeals erred in applying more liberal standards of coverage to a recreational type accident merely because such accident occurred on a defense base instead of in the United States.

(2) Whether the Deputy Commissioner and the Court of Appeals incorrectly interpreted the applicable Federal statutes and the opinions of this Court when they concluded that recreational activities of defense base employees beyond those sponsored and furnished by the employer are nevertheless incident to the employment for compensation purposes.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901, et. seq.) and the Defense Bases Act (Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U.S.C. 1651, et. seq.) are the basis for the decisions in this case. Pertinent portions of each statute are to be found in the Appendix to this petition.

STATEMENT

This action was brought in the United States District Court for the Eastern District of Virginia by the employer Pan-American World Airways and its insurance carrier The Travelers Insurance Company to set aside and enjoin the enforcement of compensation orders awarding death benefits under the Longshoremen's and Harbor Workers' Act, as extended by the Defense Bases Act, to the surviving beneficiaries of Robert M. Smith, a deceased employee. Smith at the time of his death was employed at a defense base on San Salvador Island by Pan-American World Airways, Inc., a government contractor subject to the provisions of the Longshoremen's and Harbor Workers' Act. Smith was fatally injured while riding in a jeep involved in a non-collision accident. He was not on duty at the time, was away from his place of employment and from his place of abode, and was seeking independent (not employer-furnished or sponsored) recreation in a vehicle which he was not authorized to use for that purpose. *In other words, he was on a frolic of his own when the fatal accident occurred.* The Deputy Commissioner found and concluded that the accident and resulting death arose out of and in the course of Smith's employment.

Though the facts are not stipulated, they are not disputed and may be summarized as follows:

Smith was hired in the United States to work as a powerhouse operator at Pan-American's defense base installation on San Salvador Island in the Atlantic Ocean. This was not any temporary assignment for Smith, it being the only place he was ever expected to perform Pan-American's work. He was transported to the island, and was provided with living quarters, his meals, and various types of recreation by his employer. All these things were provided at the place where he lived without expense to Smith. His work required that he put in eight hours a day at one of several power stations on the island to which he was transported in the employer's jeep. After his eight hours he was off duty until his next shift began the following day. In the interim he was subject to call, but only in the event of an emergency such as a hurricane approaching.

During his off duty hours, Smith had no working responsibilities. Instead he was completely at liberty to use the recreational facilities provided by his employer. These included beach facilities so that he might enjoy the adjoining Atlantic Ocean; row boats and kickers; skin fishing equipment; a pool room; baseball and softball equipment and facilities for their use; an outdoor movie theatre; and a recreation club. All of these were at Smith's doorstep.

The recreation club was named the "Reef Club." There the employees could read or play cards. Or they could secure and consume liquor, beer, or champagne right on the club premises.

On April 24, 1958, Smith put in eight hours at a power station in the usual manner. He was then returned by jeep to his living site. There he (presumably) washed up and then went over to the Reef Club at something after 4:00 P.M. With others of his powerhouse co-employees (who were also off duty) he began to drink beer or champagne or both at the bar of the Club. He took time out for his evening meal, eating at the living site, then returned to the Reef Club and continued to drink until about 7:30 P.M.

A movie was about to be shown in the outdoor theatre. Smith did not attend. Instead Smith, Fox F. Fry, James F. Norman and Frank J. Gondeck, all off-duty powerhouse operators, without permission and contrary to their employer's orders, "borrowed" a jeep belonging to Pan American, and set out for the Blue Marlin Club, a native-owned beer place some three miles away. Their purpose, recreation. Nothing more. Upon arrival there a few minutes later, they ordered and consumed a beer each. After about 15 minutes, they all got back in the jeep and drove back toward whence they had come. Norman apparently drove at excessive speed, lost control on the road before they reached the living quarters again, and turned the jeep over, causing injuries to all and the death of Smith and of Robert J. Gondeck.

The bar of the Reef Club was still open when they returned.

Despite the many and numerous and varied types of recreation provided Smith by Pan-American, the Deputy Commissioner found (Record, Appendix page 18-a):

> ". . . that at the time of his injury and death the deceased herein was engaged in an activity which, under the circumstances, was incidental to his employment; . . ."

The Deputy Commissioner then commented (Record Appendix Page 22-a):

> "In summary, an injury arises in the course of employment when the employee is injured or killed, while on a temporary assignment far from home, and the only reason for his being where he is is the exigencies of the employment, and he is doing what he may reasonably be expected to do."

The award followed.

On review of the testimony and of the Deputy Commissioner's findings and conclusions, the District Court set aside the award. Its well-reasoned opinion ends thus (Record, Appendix Page 13-a):

> "In summary, unless by judicial interpretation we are to alter the provisions of the Longshoremen's and Harbor Workers Compensation Act, 33 U.S.C.A. s 901, et seq., or otherwise modify the Defense Bases Act, 42 U.S.C.A. s 1651-1654, to meet the contention now advanced by the Government, thereby affording protection to any worker from the time he leaves the United States until he returns, irrespective of his activity on foreign soil, we must conclude that there can be no recovery in this case where the employee, engaged in a personal mission, met his death while participating in recreation which was adequately provided at the defense base."

The Court of Appeals for the Fourth Circuit reversed the District Court and reinstated the award. It took note of the Commissioner's conclusions thus (Record page 14):

> "The Commissioner concluded that the death of Robert M. Smith arose out of and in the course of his employment. Considering the distant place of employment, the sparsity of population and the limited area of the island, the Commissioner determined that the group, including the present decedent, were justified in looking for recreation beyond the confines of their habitat. In the circumstances of his employment-residence, the Commissioner thought Smith was only "doing what he (might) reasonably be expected to do." In short, that his brief exit was an "incident of the service."

The Court of Appeals agreed. In so doing it specifically disapproved of the opposite result obtained in *United States vs. Pan-American World Airways, Inc.* (C.C.A. 5th 1962) 299 F.2d 74; cert. denied 368 U.S. 980, wherein the death claim of Robert J. Gondeck arising from this same identical accident was *denied*.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals for the Fourth Circuit upholding the Deputy Commissioner's findings that the employee's death arose out of and in the course of his employment is in direct conflict with recent decisions of the Circuit Court of Appeals for the Fifth Circuit. The first such decision in *United States vs. Pan-American World Airways, Inc.* (C.C.A. 5th 1962) 299 F. 2d 74, cert. denied 368 U.S. 980, which involved the same identical accident as in this case but of a different claimant (Robert J. Gondeck). As indicated previously the Circuit Court of Appeals for the Fourth Circuit in the present case specifically referred to that decision and publicly disagreed with the result, using this language:

> ". . . The death of Smith's companion, Gondeck, was the subject of United vs. Pan-American World Airways, Inc.; 299 F. 2d 74 (5 Cir. 1962), refusing an award. If the evidence there adduced was of the same factual content as that offered here, we would deferentially disagree with the outcome."

The facts of course were identical in both cases, the same accident and same recreational circumstances being involved.

The latest conflicting Fifth Circuit decision is *O'Keefe* vs. *Smith, Hinchmann & Grylls Associates, Inc.* et. al. (C.C.A. 5th 1964) 327 F. 2d 1003. That case which is presently on the docket of this Court, bearing Number 307, is here on a petition for a writ of certiorari sought by the Solicitor

General of the United States acting on behalf of Deputy Commissioner O'Keefe. An employee on a defense base in South Korea drowned while enjoying non-employee sponsored or furnished recreation in his off-duty hours. *The employer furnished no recreational facilities to its employees* (in this respect the case under consideration differs) but knew that its employees would seek recreational activity after working hours. The Deputy Commissioner and the District Court concluded that in a defense base situation, all recreational activity of the employees, whether employer-sponsored or furnished or not, is incident to the employment. The Circuit Court of Appeals disagreed and reversed, saying:

> "Unless the facts of *United States and Gondeck vs. Pan American World Airways*, 5th Cir. 1962, 299 F. 2d 74, are to be distinguished or the principles there set forth are to be rejected, we must reverse the judgment of the District Court. The facts are not to be distinguished. Indeed, the facts here make a stronger case for the employer than in *Gondeck*. We adhere to the doctrine of the *Gondeck* case and reverse the District Court."

Thus a sharp division of opinion exists between these two Circuit Courts of Appeals first over whether a defense base employee accidentally injured or killed while engaged in recreation beyond that readily available from and sponsored or furnished by the employer should be entitled to compensation. Second, such division of opinion obviously extends also to the situation where no such recreation is available from or sponsored or furnished by the employer and dictates the same conflicting result. (This latter situation is *O'Keefe*, supra, your docket number 307.)

These conflicting views of the Circuit Courts of Appeal require review and resolution. It is essential that the lower courts, the deputy commissioners, and the parties themselves now receive clear and definitive instructions

as to how recreational type injuries on defense bases are to be handled. Are they to be compensated or not compensated? Is the defense base employee in fact entitled to round-the-clock protection from accidental injury or death, or is he not so entitled?

The resolution of such issues is important far beyond the confines of this case. It will have its effect upon the thousands of injury cases which arise annually from our various defense bases throughout the world. It will provide a blueprint which will outline the limits of recovery for the benefit and guidance both of those who administer the law as well as those who are affected by it.

2. The decision of the Circuit Court of Appeals for the Fourth Circuit also misinterprets the intent of Congress and misapplies the statutory provisions of the Longshoremen's & Harbor Workers' Act, as extended by the Defense Bases Act, by holding that a defense base recreational accident is compensable, even when the employee is on a frolic of his own.

Under the provisions of the Longshoremen's & Harbor Worker's Act, 33 U.S.C.s, 901 et. seq., compensation benefits for accidents are paid an industrial worker in the United States only if his injury or death arose out of and in the course of his employment. Thus, round-the clock coverage of industrial workers in the United States is not contemplated therein. This statute, enacted first in 1927 by Congress, has never been amended in that regard.

The Defense Bases Act was enacted by Congress in 1941. Its purpose was to establish a workmen's compensation system for civilian employees of private contractors who perform work at our defense bases set up on foreign soil. These employees and their employers were not prior to 1941 covered by or subject to any workman's compensation law of the United States and were relegated in industrial accident cases to the provisions of the law of whatever foreign country the defense base happened to be in. The Act therefore gave protection to both employee and to

employer at foreign bases which had not been previously afforded. But it was never the intent of Congress to do anything except grant to defense base employees the same identical protection already afforded employees in the United States. No greater status was to be extended a defense base employee than that enjoyed by a similar employee working in the United States.

This intent of Congress shows up clearly in the legislative history of the Act. The Senate Report No. 540, 77th Congress (Calendar No. 557) dated July 10, 1941, from the Committee on Military Affairs states that:

> "The design of this measure is to provide substantially the same relief for injuries or death of employees at bases leased by the United States from Great Britain or any other country as existing law affords similar employees in the United States, and to assist contractors employing labor at such bases in obtaining compensation insurance at reasonable rates."

This identical explanation accompained the bill in its passage through the House of Representatives. (H. R. Report No. 1070, 77th Congress, Committee on the Judiciary, dated July 29, 1941).

Clearly then the Defense Bases Act as enacted in 1941 did not set defense base employees apart from or above similar employees in the United States. Instead it made them equally entitled to the benefits of the Longshoremen's and Harbor Worker's Act. But in so doing it also made them subject to the same limitations applicable to employees in the United States. For it requires that the accident and injury "arise out of and in the course of the employment." It did not extend round-the-clock coverage to defense bases that the Court below found.

In the years since 1941 the Defense Bases Act has been amended several times. Congress has now granted round-the-clock coverage to defense base employees during the time they are being transported between the United States and their base of employment (42 USC §1651 (a) (4)). But the original requirement that the accident arise out of and in the course of employment otherwise remains in full force and effect.

Obviously Congress could now liberalize these statutes by eliminating employment connection as a prerequisite and grant round-the-clock coverage in all defense base cases. But it has not done so. And for any Court to now read such a liberalizing feature into the statute is for it to legislate and to substitute its views of what the law should be for what the Congress has said that it is.

And the reasoning of the Court below leading to this legislative result is no less objectionable because it was indirect. Thus the liberal and loose interpretation of the statutory wording "arising out of and in the course of employment" so as to incorporate all recreational accidents as incident to the employment does violence equally to the intent and will of Congress, and is equally to be dealt with and struck down.

3. The Circuit Court in ruling as it did has also misinterpreted and misapplied this Court's decision stated in *O'Leary v. Brown-Pacific-Maxon, Inc.* (US 1951) 340 US 504, 71 S. Ct. 470. There a defense base employee drowned in attempting to rescue another. He had been using employer-provided recreation facilities just before he died. In attempting the rescue, he left these facilities and swam out into a dangerous and forbidden area. This Court reinstated the original award of compensation. But in so doing Mr. Justice Frankfurter made it clear for the Court that not every recreation type accident was automatically compensable. His language was this:

"We hold only that rescue attempts such

> as that before us are not necessarily excluded from the coverage of the Act as the kind of conduct that employees engage in as frolics of their own."

There is no doubt then that this Court never said or intended to say that the frolics of defense base employees on their own are to be held compensable. Nor did this Court ever intend that its "zone of special danger" language relied on by the Circuit Court below should encompass all recreational accidents under all circumstances to all defense base employees merely because they were living in quarters on a foreign base instead of in the security of their own home in the United States.

The Circuit Court of Appeals having misconstrued the teaching of this Court in *O'Leary*, a further review of the problem seems imperative to clear the air and to straighten out the guidelines now tangled by the opinion below.

4. The findings and conclusion of the Deputy Commissioner aproved by the Circuit Court of Appeals do violence to the record considered as a whole. It is not contradicted that the death of the employee occurred after he left the recreational facilities furnished by his employer and struck out on a frolic of his own to duplicate that recreation elsewhere. He had beer to drink on his base. He left that base to purchase and drink more beer in a native tavern three miles away. The record does not support the conclusion of the Commissioner that this frolic was an incident to the employment of Robert M. Smith.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN W. WINSTON
Counsel for Petitioners

September, 1964

APPE

ENDIX

APPENDIX A

1. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901*et seq.*) *provides in part*:

SEC. 2. DEFINITIONS.—When used in this Act—

* * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * *

SEC. 3. COVERAGE.—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * *

SEC. 19. PROCEDURE IN RESPECT OF CLAIMS.—

(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * *

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the

contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). * *

2. The Defense Bases Act (Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U.S.C. 1651 *et seq.*) provides in part:

* * * *

That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possessions outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

(3) upon any public work in any Territory or possession outside the continental United States (including the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone), if such employee is engaged in employment at such place under the contract of a contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) with the United States; but nothing in this paragraph shall be construed to apply to any employee of such a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

* * * *

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9340.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED, AND THE TRAVELERS INSURANCE COMPANY,
Appellees,

versus

STEPHEN O'HEARNE, Deputy Commissioner, Fifth Compensation District, U. S. Department of Labor, Bureau of Employees' Compensation,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued June 12, 1964. Decided July 13, 1964)

Before BRYAN and BELL, Circuit Judges, and CRAVEN, District Judge.

Leavenworth Colby, Attorney, Department of Justice, (John W. Douglas, Assistant Attorney General, Morton Hollander, Attorney, Department of Justice, and Claude V. Spratley, Jr., United States Attorney, on brief) for Appellant, and John W. Winston (Seawell, McCoy, Winston & Dalton on brief) for Appellees.

PER CURIAM:

An award under the Defense Bases Act, 42 U.S.C. 1651-1654, was made by the Deputy Commissioner to the widow and orphans of Robert M. Smith, an employee of Pan American World Airways, Inc., for his death on San Salvador (Watling) Island in the Bahamas, a British West Indies possession where Columbus first raised land. The fatality resulted when a jeep overturned in which the decedent was riding as a passenger with other employees for recreation. He had been hired by PAA as a powerhouse operator in its performance of a Government contract for the maintenance of Atlantic range facilities in connection with the United States Air Force Missile Test Center at Cape Kennedy, Florida.

Robert Smith's home and family were in Galax, Virginia, about 1000 miles distant. Pursuant to his engagement he was provided sleeping quarters and meals at the power station. Work occupied 8 hours each day but for any emergency he was subject to call during off-time. Tracking equipment was situated throughout San Salvador.

Aside from its remoteness, the island embraced only about 42 square miles—5 miles by 13 miles in its greatest dimensions. The population consisted of approximately 800 natives. British official personnel added another 50 individuals. The only settlement, Cockburn Town, was about three miles from Smith's dormitory.

Where Robert Smith was quartered PAA furnished the employees a pool room, an outdoor picture theatre, row boats, baseball and softball equipment. Of course, the Ocean and beach provided swimming, fishing and boating opportunities. Additionally, the Reef Club was maintained there at which alcoholic beverages could be purchased, and

reading and card playing enjoyed. The employer supplied no transportation for the workers to leave the site. Taxis were available, and on occasion upon request use of a jeep would be allowed by PAA for recreational trips.

On April 24, 1958, when Robert Smith had completed his regular assignment for the day, he went to the Reef Club, soon after 4 o'clock P.M. Except for time at dinner or supper, he remained there with three other co-employees drinking beer or champagne.

Around 7:30 P.M. they drove in one of PAA's jeeps—whether with the tolerance of the employer is not clear—to a native pub in Cockburn Town, known as "Evelyn's" or the "Blue Marlin Club." Here they obtained another beer, returning to the jeep in about fifteen minutes. As they approached the base, the vehicle overturned from excessive speed or due to a defect in the road. Smith and another employee, Gondeck, were killed. Neither of them was the driver, intoxication was not ascribed as a factor in their deaths. The entire excursion occupied no more than a half hour.

The Commissioner concluded that the death of Robert M. Smith arose out of and in the course of his employment. Considering the distant place of employment, the sparsity of population and limited area of the island, the Commissioner determined that the group, including the present decedent, were justified in looking for recreation beyond the confines of their habitat. In the circumstances of his employment-residence, the Commissioner thought, Smith was only "doing what he [might] reasonably be expected to do." In short, that his brief exit was "an incident of the service."

PAA and its insurance carrier, The Travelers Insurance Company, successfully petitioned the District Court to vacate the conclusion and award as not vindicated by the proof. The Commissioner appeals. Although some of the factual ascertainments made by the Commissioner may be without full support, we think substantial evidence undergirds his crucial and determinative fact findings. To these he applied correct and apt principles of law. Together they dictate the award.

Like the Commissioner, we see decision here designed and patterned in O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951). Sustaining, too, is Self v. Hanson, 305 F.2d 699 (9 Cir. 1962). The death of Smith's companion, Gondeck, was the subject of United States v. Pan American World Airways, Inc., 299 F.2d 74 (5 Cir. 1962, refusing an award. If the evidence there adduced was of the same factual content as that offered here, we would deferentially disagree with the outcome.

Upon the findings, conclusions and reasons stated by the Commissioner, we believe his award should be reinstated.

Reversed.

JUDGEMENT

Filed and Entered, July 13, 1964.

UNITED STATES COURT OF APPEALS

for the

FOURTH CIRCUIT

No. 9340

Pan-American World Airways, Incorporated, and The Travelers Insurance Company,

Appellees,

vs.

Stephen O'Hearne, Deputy Commissioner, Fifth Compensation District, U. S. Department of Labor, Bureau of Employees' Compensation,

Appellant.

APPEAL FROM *the United States District Court for the* . . . Eastern . . . *District of* . . . Virginia.

THIS CAUSE *came on to be heard on the record from the United States District Court for the* . . . Eastern . . . *District of* . . . Virginia . . . . . *, and was argued by counsel.*

ON CONSIDERATION WHEREOF, It is now here ordered *and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby*, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of the Court filed herein.

FILED
Jul. 13, 1964
MAURICE S. DEAN
Clerk

/s/ ALBERT V. BRYAN
United States Circuit Judge.

/s/ J. SPENCER BELL
United States Circuit Judge.

/s/ J. B. CRAVEN, JR.
United States District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 474

PAN AMERICAN WORLD AIRWAYS, INC., AND THE TRAVELERS INSURANCE CO., PETITIONERS

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, FIFTH COMPENSATION DISTRICT, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE DEPUTY COMMISSIONER

The court below affirmed the deputy commissioner's finding that the death of a defense base employee, while he was engaged in recreational activity, arose out of and in the course of his employment, within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*) as extended by the

Defense Bases Act (56 Stat. 1035, as amended, 42 U.S.C. 1651, *et seq.*). The claim for death benefits in this case arose out of the very same "jeep" accident as the claim for death benefits in *United States* v. *Pan American World Airways*, 299 F. 2d 74, certiorari denied, 370 U.S. 918, in which the Fifth Circuit rejected the deputy commissioner's finding that the employee's death arose out of and in the course of his employment.

We believe that the instant case and the Fifth Circuit's *Pan-American* decision, *supra*, reflect a conflict of approach in determining whether an injury to an overseas defense base employee arose out of and in the course of his employment. The Ninth Circuit, like the court below, has adopted the more liberal view. See *Self* v. *Hanson*, 305 F. 2d 699 and *Hastorf-Nettles, Inc.* v. *Pillsbury*, 203 F. 2d 641. The Fifth Circuit adheres to the position which it enunciated in its *Pan-American* decision. See *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 327 F. 2d 1003, in which the government has recently filed a petition for a writ of certiorari (No. 307, this Term).[1]

---

[1] In the supplement to our petition for certiorari in the *Smith, Hinchman* case, we pointed out that the decision of the Fifth Circuit in that case is in clear conflict with the decision of the Fourth Circuit in the present case.

Although we believe that the decision below is correct, we agree with petitioner, for the reasons elaborated in our petition in No. 307, that the conflict should be resolved. We accordingly acquiesce in a grant of the writ.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

OCTOBER, 1964.